

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	

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COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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**RONALD K. CHEN  
PUBLIC ADVOCATE**

**Kimberly K. Holmes, Esq.  
Acting Director**

Division of Rate Counsel  
31 Clinton Street, 11<sup>th</sup> Floor  
P.O. Box 46005  
Newark, NJ 07101  
(973) 648-2690 - Phone  
(973) 624-1047 – Fax  
[www.rpa.state.nj.us](http://www.rpa.state.nj.us)  
[njratepayer@rpa.state.nj.us](mailto:njratepayer@rpa.state.nj.us)

On the Comments:

Christopher J. White, Esq.  
Deputy Public Advocate

*Economic Consultant:*  
Susan M. Baldwin

Date: June 15, 2007

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**I. INTRODUCTION AND SUMMARY**

In response to the Notice of Inquiry (“NoI”) released on April 16, 2007, by the Federal Communications Commission (“FCC” or “Commission”),<sup>1</sup> the New Jersey Division of Rate Counsel (“Rate Counsel”) submits these comments regarding industry practices for broadband and related services.

**A. INTEREST OF THE RATE COUNSEL IN THE INSTANT PROCEEDING.**

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities.<sup>2</sup> Rate Counsel participates actively in relevant Federal and state

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<sup>1</sup>/ *In the Matter of Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry (“NoI”), FCC 07-31 (rel. April 16, 2007). Comments are due June 15, 2007, and reply comments are due July 31, 2007.

<sup>2</sup>/ Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Whitman’s Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at N.J.S.A. 13:1D-1, et seq. The mission of the Ratepayer

administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996. The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices." The Commission's broadband policy, set forth in this and other pending proceedings, directly affects consumers' ability to access the information-rich resources of the Internet, which, in turn, affects consumers' ability to partake fully in mainstream economic and social activities.

## **B. SCOPE OF THE NOTICE OF INQUIRY**

The FCC explains the purpose of this proceeding as follows:

In this Notice of Inquiry, we seek to enhance our understanding of the nature of the market for broadband and related services, whether network platform providers and others favor or disfavor particular content, how consumers are affected by these policies, and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers. We ask for specific examples of beneficial or harmful behavior, and we ask whether any regulatory intervention is necessary.<sup>3</sup>

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Advocate was to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that were just and nondiscriminatory. In addition, the Ratepayer Advocate worked to insure that all consumers were knowledgeable about the choices they had in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (N.J.S.A. §§ 52:27EE-1 *et seq.*). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest," N.J.S.A. 52: 27EE-57, i.e., an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A.52:27EE-12; The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

<sup>3</sup> / *NoI*, at para. 1

On April 16, 2007, the FCC also concurrently adopted two related items. The FCC released a Notice of Proposed Rulemaking in WC Docket No. 07-38 (“Broadband Data NPRM”), seeking input regarding the improvement of broadband data collection, including comprehensive data to determine the availability of broadband deployment in all areas of the country.<sup>4</sup> In a third proceeding, GN Docket No. 07-45, the Commission is conducting an inquiry into broadband deployment.<sup>5</sup>

### C. SUMMARY OF COMMENTS

Rate Counsel reiterates some of the recommendations and concerns about broadband deployment and industry practices that it has raised in other Commission proceedings. These initial comments are brief, and Rate Counsel anticipates submitting reply comments based on its review of the information and proposals submitted by others. Rate Counsel responds generally to the specific questions that the Commission poses as follows:

- Net neutrality is essential to the continuing deployment of innovative, decentralized applications and information sources, which rely on open access to the Internet;

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<sup>4</sup> / *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, *Notice of Proposed Rulemaking*, rel. April 16, 2007 (“Broadband Data NPRM”). Rate Counsel is submitting initial comments today in response to the *Broadband Data NPRM*. Reply comments are due July 16, 2007

<sup>5</sup> / *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, *Notice of Inquiry*, FCC 07-21, rel. April 16, 2007 (“Notice”). Rate Counsel submitted initial and reply comments on May 15, 2007 and May 31, 2007, respectively.

- Although Rate Counsel welcomes diverse technological platforms, consumer choice of broadband providers is not yet sufficient to ensure that broadband industry practices benefit consumers;
- Regulatory intervention is necessary to prevent the cable-telecommunications duopoly from exerting anticompetitive control over the information that consumers upload and download over the Internet;
- The Commission should ensure that incumbent local exchange carriers (“ILECs”) are meeting the merger commitments that relate to Internet practices; and
- The Commission should ensure that broadband deployment does not erode the consumer protection policies and rules that federal and state regulators have devoted years to establishing.<sup>6</sup>

## II. NET NEUTRALITY

Rate Counsel has consistently opposed the prospect of the industry acting as gatekeeper to the Internet. More than a year ago, Rate Counsel stated in its filing in the Commission’s WC Docket No. 05-271, *Consumer Protection in the Broadband Era*: “In effect, the RBOCs may attempt to create a two-tiered Internet, where their own services are offered to consumers at high quality and high speed, while signals from competing companies are intentionally degraded or slowed.”<sup>7</sup> As is described below, Rate Counsel also raised concerns about net neutrality in other Commission proceedings. Regulatory

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<sup>6</sup> / Rate Counsel requests that the Commission consider the comments filed by Rate Counsel on January 17, 2006, and March 1, 2006, in the Commission’s broadband consumer protection proceeding as the Commission deliberates on the issues under investigation in this proceeding. *In the Matter of Consumer Protection in a Broadband Era*, WC Docket No. 05-271.

<sup>7</sup> / *In the Matter of Consumer Protection in a Broadband Era*, WC Docket No. 05-271, Rate Counsel initial comments, January 17, 2006, at 22. Rate Counsel also recommended that “[t]he two-tiered system that Verizon and other ILECs propose with premium prices for premium access to the Internet should be rejected.” *Id.*, at 7; *see generally, id.*, at 21-23.

intervention is essential to counter-balance the economic incentive and the potential for broadband service providers to engage in anticompetitive behavior by limiting access or by degrading service that they offer to Internet application providers whose products compete with incumbents' products.

In 2005, the Commission issued a Policy Statement, which propounded four principles to guide broadband regulation:

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>8</sup>

The Commission approved the Verizon/MCI and SBC/AT&T mega-mergers, conditioned on, among other things, Verizon's and AT&T's commitment to abide by these four principles.<sup>9</sup>

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<sup>8</sup>/ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC 05-151, Policy Statement, 20 FCC Rcd 14986 (2005), at Rcd 14988 ("Policy Statement"), at para. 4.

<sup>9</sup>/ As a condition of the Commission's approval of the Verizon/MCI merger, Verizon is subject to the following provision: "Effective on the Merger Closing Date, and continuing for two years thereafter, Verizon/MCI will conduct business in a manner that comports with the principles set forth in the FCC's Policy Statement, issued September 23, 2005 (FCC 05-151)." *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, FCC WC Docket No. 05-75, *Memorandum Opinion and Order*, rel. November 17, 2005 ("Verizon/MCI Merger Order"), Appendix G. *See, also, In the Matter of SBC Communications Corp. and AT&T Corp., Inc. Applications for Approval of Transfer of Control*, FCC WC Docket No. 05-65, *Memorandum Opinion and Order*, rel. November 17, 2005 ("SBC/AT&T Merger Order"), Appendix F. Although these conditions are



More recently, in its comments submitted regarding the Commission's investigation of the AT&T/BellSouth merger, Rate Counsel stated that "[t]he proposed merger jeopardizes net neutrality, and, therefore, the Commission should condition any approval of the proposed transaction on a commitment to net neutrality, without a sunset provision."<sup>10</sup>

In March 2007, in its decision approving the merger of AT&T and BellSouth, the Commission conditioned its approval of the transaction upon a commitment that the merged company would not only refrain from behavior contrary to the principles set forth in the Commission's existing Policy Statement,<sup>11</sup> but also, more significantly, would abide by a "net neutrality" condition. According to this fifth broadband policy principle, AT&T agreed "not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination."<sup>12</sup>

The provision represents significant progress for consumer protection in the emerging broadband era, but does not protect all Americans. Furthermore, the sunset provision in the condition means that the protection will be relatively short-lived, and, therefore, timely action in this proceeding, or in a separate rulemaking proceeding, is

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enforceable, they lack the fifth, "net neutrality" principle that applies to AT&T as a condition of its merger with BellSouth.

<sup>10</sup> / *In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, FCC WC Docket No. 06-74, Rate Counsel initial comments, June 5, 2006, at 21; see also *id.*, Declaration of Susan M. Baldwin and Sarah M. Bosley, June 5, 2006, at paras. 214-234; Declaration of Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington, October 3, 2006, at paras. 107-112.

<sup>11</sup> / *In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, FCC WC Docket No. 06-74, *Memorandum Opinion and Order*, rel. March 26, 2007 ("AT&T/BellSouth Merger Order"), at Appendix F.

<sup>12</sup> / *NoI*, at para. 3. See, also, *AT&T/BellSouth Merger Order*, at Appendix F.

essential to provide more long-lasting net neutrality. Also, because the condition protects only AT&T's consumers, timely action is essential to provide comparable protection for consumers beyond AT&T's footprint.<sup>13</sup>

Finally, the divergent opinions expressed by the Commissioners in their statements accompanying the *AT&T/BellSouth Merger Order* underscore the precarious future of net neutrality. Rate Counsel supports the rationale set forth in the concurring statements in the *AT&T/BellSouth Merger Order*, which explain the importance of net neutrality.<sup>14</sup> Rate Counsel is hopeful that the information submitted in this proceeding will sway the opposing viewpoint expressed in a separate joint statement, included with the Commission's *AT&T/BellSouth Merger Order*.<sup>15</sup> Although the Commission's NoI raises several significant questions, the most important issue concerns the future of net neutrality. Rate Counsel urges the Commission to establish enforceable policy

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<sup>13/</sup> The network neutrality merger condition, assuming adequate enforcement, now protects AT&T's customers. However, consumers located outside of AT&T's footprint lack this fundamental protection, and, therefore, are vulnerable to the practices of their broadband access providers.

<sup>14/</sup> See Concurring Statement of Commissioner Jonathan S. Adelstein stating, among other things, "One hallmark of this Order is that it applies explicit, enforceable provisions to preserve and protect the open and interconnected nature of the Internet, including not only a commitment to abide by the four principles of the FCC Internet Policy Statement but also an historic agreement to ensure that the combined company will maintain a neutral network and neutral routing in its wireline broadband Internet access service. Together, these provisions are critical to preserving the value of the Internet as a tool for economic opportunity, innovation, and so many forms of civic, democratic, and social participation." *AT&T/BellSouth Merger Order*, at 176. See also, Concurring Statement of Commissioner Michael J. Copps, which includes the following: "My response is that in an age when the Internet is increasingly controlled by a handful of massive private network operators, the source of centralized authority that threatens the Internet has dramatically shifted. The tiny group of corporations that control access to the Internet is the greatest threat to Internet freedom in our country today. If left unchecked, the merged entity resulting from today's decision would have gained the ability to fundamentally reshape the Internet as we know it – in whatever way best serves its own profit motives, rather than preserving the integrity and the effectiveness of the Internet." *AT&T/BellSouth Merger Order*, at 171.

<sup>15/</sup> See, Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, which states, among other things: "conditions, however, are unnecessary and may actually deter broadband infrastructure investment. The conditions regarding net-neutrality have very little to do with the merger at hand and very well may cause greater problems than the speculative problems they seek to address. These conditions are simply not warranted by current market conditions and may deter facilities investment. Accordingly, it gives us pause to approve last-minute remedies to address the ill-defined problem net neutrality proponents seek to resolve." *Id.*, at 167.

preventing those companies that provide information pipes to the nation from controlling consumers' access to information.

### **III. CONSUMER PROTECTION**

Rate Counsel reiterates concerns that it raised more than a year ago in a different broadband proceeding:

The regulation of broadband Internet access providers is necessary to ensure that the deployment of new technology does not erode the framework of consumer protection policies and rules that the Commission and state regulators have spent years to design and enforce. Existing market forces are insufficient to ensure that the market works efficiently and that consumers are adequately protected. Broadband access is based on a duopoly that is emerging consisting of cable companies and telephone companies.<sup>16</sup>

Rate Counsel urges the Commission to require Internet access providers to provide consumers with clear information about any limits that the providers may have on downloading, as well as about pricing practices, time limits on introductory rates, and other information about the rates, terms, and conditions of Internet access. Finally, while the Commission is investigating broadband industry practices, Rate Counsel urges the Commission to monitor the practices of broadband providers, to analyze consumer complaints carefully, and to collaborate with state regulators to assess the status of the market. Rate Counsel reiterates its assertion that “[a]s the nation migrates to a more advanced telecommunications platform, consumer protection goals are as important as they are and have been in the world of plain old telephone service (“POTS”).”<sup>17</sup> Rate Counsel also repeats its concern, expressed in a different FCC proceeding, about the potential erosion of consumer protection:

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<sup>16</sup>/ *In the Matter of Consumer Protection in a Broadband Era*, WC Docket No. 05-271, Rate Counsel initial comments, January 17, 2006, at 4.

<sup>17</sup> / *Id.*, at 6.

Hard-fought-for consumer protection should not be sacrificed in the name of technological innovation and advancement. As demand for broadband increases, and broadband evolves into a more ubiquitous mode of communication platform (and in the pursuit of such ubiquity), the FCC should not relinquish the consumer protection that has evolved for traditional telephone service.<sup>18</sup>

Also, Rate Counsel repeats an earlier caution to the Commission, and, specifically “urges the Commission to reject the industry’s recommendation that regulators wait until *after* there is substantial evidence of misconduct in the market and a history of consumer harm before even beginning to address consumer protection measures.”<sup>19</sup>

Finally, Rate Counsel continues to urge the Commission to recognize explicitly the important role of states in regulating broadband services. Rate Counsel stated earlier, and continues to support the following:

Congress gave no expressed directive to the FCC regarding broadband including preempting states in regulating broadband. Any attempt to limit state jurisdiction interferes with state authority and implicates the role of the state and federal government under our Constitutional form of Government. The Ratepayer Advocate submits that there is concurrent jurisdiction over broadband. Although Section 706 of the Act encourages deployment of advanced services, nothing in this section grants the FCC the right to exclusive jurisdiction or evidence an expressed intent to preempt state authority. In regard to consumer protection, states are in the best position to protect consumers and therefore, although the Ratepayer Advocate supports federal-state cooperation, states should be afforded substantial latitude in setting and enforcing consumer protection rules and regulations.<sup>20</sup>

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<sup>18</sup> / *Id.*, at 7.

<sup>19</sup> / *In the Matter of Consumer Protection in a Broadband Era*, WC Docket No. 05-271, Rate Counsel reply comments, March 1, 2006, at 4 (emphasis in original).

<sup>20</sup> / *In the Matter of Consumer Protection in a Broadband Era*, WC Docket No. 05-271, Rate Counsel initial comments, January 17, 2006, at 6.

#### IV. LACK OF COMPETITION

The Commission asks whether “consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers.”<sup>21</sup> The Commission similarly asks whether “increasing broadband competition prevents such problems from occurring.”<sup>22</sup> Contrary to the Commission’s reference to increasing competition, consumers have little if any choice in the provision of broadband access in a significant portion of the U.S. Typically, if even two choices are available, one is the ILEC, and the other is the cable television provider. Thus, the “competition” is based on only two products – DSL service and cable modem service.<sup>23</sup>

Rate Counsel notes that the Commission, in its *Broadband Deployment* proceeding, also seeks information on the extent to which consumers have a choice of broadband services and providers.<sup>24</sup> Rate Counsel, in its comments filed in the *Broadband Deployment* proceeding, demonstrated that consumers lack competitive

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<sup>21</sup> / *NoI*, at para. 1

<sup>22</sup> / *NoI*, at para. 11.

<sup>23</sup> / See Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington, “The Cable-Telco Duopoly’s Deployment of New Jersey’s Information Infrastructure: Establishing Accountability,” White Paper prepared for the Public Advocate of New Jersey Division of Rate Counsel, January 19, 2007 (“Cable-Telco Duopoly White Paper”). The Cable-Telco Duopoly White Paper was prepared on behalf of the Public Advocate of New Jersey Division of Rate Counsel and submitted as Attachment A to the Comments of the New Jersey Division of Rate Counsel in the proceeding *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, May 16, 2007.

<sup>24</sup> / *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC GN Docket No. 07-45, *Notice of Inquiry*, rel. April 16, 2007, at para. 16.

choice, and in these comments, requests that the Commission incorporate those comments of the Rate Counsel in this proceeding.<sup>25</sup>

## **V. PRICING FOR BROADBAND AND RELATED SERVICES**

The Commission requests information on pricing and speeds of broadband access plans, and asks whether real prices (*i.e.*, price per Mbps) paid by broadband consumers are falling.<sup>26</sup> Comments submitted in CC Docket No. 80-286 (the “separations” proceeding), on behalf of the National Association of State Utility Consumer Advocates (“NASUCA”), Rate Counsel, and the Maine Office of the Public Advocate demonstrate that the ILECs’ allocation of their common network costs is flawed, and that a greater share of common costs should be allocated to the ILECs’ unregulated services, such as their DSL offerings.<sup>27</sup> However, precisely because ILECs are *not* making these corrections to their allocation and assignment of common costs, DSL rates should be significantly less than prevailing DSL rates. Indeed, ILECs recover the vast majority of the cost of the underlying platform that supports DSL from regulated rates and, therefore, the incremental cost of supplying DSL is likely negligible. Rate Counsel urges the Commission to require carriers to demonstrate either that their DSL rates are cost-based, or, in the alternative, to demonstrate that they have assigned and allocated a fair portion of common network costs to unregulated services.

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<sup>25</sup> / *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC GN Docket No. 07-45, Rate Counsel initial comments, May 16, 2007, at 18-21.

<sup>26</sup> / *NoI*, at para. 9.

<sup>27</sup> / *See, generally, In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, initial comments of the National Association of State Utility Consumer Advocates (“NASUCA”), Rate Counsel, and the Maine Office of the Public Advocate, August 22, 2006, and affidavits referenced therein.

## **VI. JURISDICTIONAL ISSUES**

The Supreme Court has recognized the Commission's jurisdiction to regulate Internet access providers.<sup>28</sup> As stated in the NoI,

- Broadband services are “wire communications” or “radio Communications,” as defined by the Act.
- The Act gives the Commission jurisdiction over “all interstate and foreign communications by wire or radio.”
- Section I of the Act imposes on the Commission the responsibility to ensure “a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” Included in this responsibility are the tasks: “to promote the continued development of the Internet”; “to preserve the vibrant and competitive market that presently exists for the Internet”; and “to encourage the deployment of technologies which maximize user control over what information is received by ... [users] of the Internet.”<sup>29</sup>

Rate Counsel recommends that the Commission exercise its regulatory authority, in collaboration with states (consistent with the dual roles contemplated by Section 706 of the 1996 Act) to promote the continuing development of the Internet in a manner that benefits all consumers. Furthermore, Rate Counsel recommends that the Commission dispel any lingering uncertainty about state and federal oversight of broadband services.

## **VII. CONCLUSION**

Rate Counsel urges the Commission to recognize and affirm the concurrent jurisdiction of states as it addresses broadband industry practices. Rate Counsel also urges the Commission to take steps to close the digital divide by promoting affordable prices for Internet access. Finally, Rate Counsel supports rules that prevent undue discrimination in access to the Internet.

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<sup>28</sup>/ *NoI*, at para. 4.

<sup>29</sup>/ *Id.*, at paras. 4-7; 47 U.S.C. Sections 153(33), (52), 152(a), and 230.

Respectfully submitted,

RONALD K. CHEN  
PUBLIC ADVOCATE

Kimberly K. Holmes, Esq.  
Acting Director

By: *Christopher J. White*  
Christopher J. White, Esq.  
Deputy Public Advocate

*Economic Consultant:*  
Susan M. Baldwin

Dated: June 15, 2007